asserted interest in a manner less intrusive to respondent's First Amendment rights."[114] Applying this narrow tailoring requirement, the Court has made it clear that the government may not restrict commercial speech if non-speech-restrictive alternatives are available to serve the government's interest.

NAA submits that, as in C & P Telephone and Coors, there are certainly less restrictive, more narrowly tailored alternatives available than the outright ban on newspaper/broadcast cross-ownership that is in place today. For example, even absent the newspaper/broadcast ban, newspaper publishers would remain subject to the rules limiting radio and television station ownership in general. Further, to the extent the Commission seeks to promote and preserve economic competition (e.g., for advertising revenues), it may appropriately rely on the antitrust laws and defer to the Department of Justice and/or the Federal Trade Commission for enforcement.

In light of the changes in the marketplace described above, there is no need to maintain a complete ban on local newspaper/broadcast cross-ownership in order to foster diversity in the marketplace. On the contrary, technological advances and growth in the marketplace already have provided the "hoped for" gain in diversity the

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[114] Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995). See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n., 447 U.S. 557, 566 (1980) (in which the Supreme Court stated that when the government seeks to restrict speech, it has the burden of demonstrating a substantial interest, and that the restrictions imposed are "not more extensive than is necessary" to advance those interests); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993) (in which the Court invalidated an ordinance prohibiting the use of newsracks to distribute commercial handbills, holding that "if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

1975 cross-ownership ban was intended to foster. Indeed, particularly in light of the Commission's recent easing of the application of the one-to-a-market rule, which now routinely allows one entity to own at least one television station, two AM, and two FM stations, and other recent and proposed relaxations of its media ownership limitations, there is certainly no basis for the FCC to continue to preclude newspaper publishers from owning any same-market broadcast stations.

In sum, NAA submits that the Commission has an obligation to review the legality of its newspaper/broadcast cross-ownership ban in light of the substantial changes in the information marketplace in the two decades since the rule was adopted, as well as the increasingly stringent requirements of applicable judicial precedent.[115] Upon such review, NAA is confident that the Commission will conclude that the underlying rationale has deteriorated to such an extent that the cross-ownership restriction may no longer be maintained.

V. THE COMMISSION SHOULD ADOPT A LIBERAL WAIVER POLICY AND MOVE QUICKLY TO COMMENCE A RULEMAKING PROCEEDING DESIGNED TO ELIMINATE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE IN ITS ENTIRETY.

NAA recognizes that the Commission, in this proceeding, seeks only to determine what changes, if any, should be made to its newspaper/radio cross-ownership waiver policy. For the reasons set forth above, however, NAA submits that the Commission should move quickly to commence a rulemaking proceeding looking

[115] See Syracuse Peace Council, 867 F.2d 654.

toward the repeal of the anachronistic cross-ownership ban now set forth in Section 73.3555(d) of the Rules. In the interim, and at a minimum, the agency should adopt a liberal waiver policy that provides a reasonable assessment of the current level of competition and diversity by taking into account the wide array of competing media now present in virtually every market and by using a geographic market definition comparable in scope to those used in the context of other cross-ownership rules. Moreover, the Commission should refrain from imposing additional barriers to waiver of the newspaper/radio cross-ownership rule, such as a "special circumstances" requirement, that are not applied in other cross-ownership waiver situations.

A. A Presumptive Waiver Standard Based Upon a Minimum Number of Voices, Without Regard to Market Rank, Will More Effectively Reflect the Level of Media Competition Present in a Station's or Newspaper's Service Area.

The Commission asks, first, whether it should adopt a waiver policy in which a transaction is deemed to be in the public interest "if it is in a market of specified numerical rank or larger and a specified number of independently owned voices would remain" after the proposed transaction. Alternatively, the agency inquires whether a "waiver test [should] turn on whether a specified minimum number of voices remains after the transaction without reference to market rank."[116]

NAA supports the use of a presumptive waiver standard based upon the presence of a minimum number of voices test, without reference to the market's

[116] Notice of Inquiry, 11 FCC Rcd at 13009.

numerical ranking. A standard utilizing numerical market rankings (which are based on population, number of television households, etc., rather than the actual level of diversity within the market) could result in a proposed combination being disapproved even though the market in question in fact had greater diversity than another market deemed "larger" under a numerical market ranking. There is no reasoned basis for refusing to grant a waiver -- notwithstanding the presence of a diversity of media sources -- merely because the market in question has failed to achieve a sufficient "rank," and, thus, no reason to utilize market rankings in the Commission's analysis.[117]

NAA recognizes that, in revising its one-to-a-market waiver policies in 1989, the Commission imposed a market rank test out of an abundance of caution.[118] There, the Commission acknowledged, however, that the standard it adopted "is conservative and may far exceed the market size and the number of voices necessary to ensure diversity and prevent competitive abuses."[119] Given the continued and growing vitality of these larger markets and the experience of several years under the admittedly restrictive one-to-a-market test, NAA believes that the Commission should now feel entirely comfortable in adopting a test based solely on the number of voices in

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[117] Moreover, if the standard included a market rank component, the Commission would have to determine how to deal with changes in market ranking over time. The Commission has noted the problems that arise from freezing a list of market designations that will eventually become outdated. See Definition of Markets For Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, 11 FCC Rcd 6201, 6220 (1996) ("Television Market Definition").

[118] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[119] Id.

the market. A simple and straightforward "minimum voices" test will both ensure that the agency's goals of preserving competition and diversity are met and make it easy for the parties and the Commission to determine whether a particular transaction satisfies the requirements of the waiver policy.

B. The Commission Should Scrupulously Avoid Any Policy that Requires "Weighting" of the Strength or Impact of Particular Media Outlets or Information Providers.

The Commission also seeks comment on whether it should "give equal consideration to waiver requests irrespective of the strength of the particular media outlets involved," or give "different consideration to requests depending on whether the newspaper involved is a major paper or the radio station involved has a certain level of market penetration, has a certain level of authorized power, or is of a particular class of station."[120]

NAA submits that the Commission should not become involved in evaluating whether a particular speaker carries more, less, or the same "weight" as another. Indeed, in a recent one-to-a-market case, the Commission expressly recognized that proposed combinations of stations with "significant" technical facilities do not present issues of market dominance when a substantial number of competing facilities are present in the market.[121] In other words, given an adequate level of overall diversity

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[120] Notice of Inquiry, 11 FCC Rcd at 13010.

[121] S.E. Licensee G.P. et al., FCC 96-463, ¶ 19 (rel. Nov. 27, 1996).

in a market, there is no need to analyze the technical facilities of the properties to be commonly owned.

Moreover, NAA submits that the public -- and not the agency -- is the only appropriate body to determine the "strength" of one voice as opposed to another. Thus, there is no justification for creating different standards for urban and suburban newspapers, or "weighting" broadcast stations based upon their signal strength, audience levels, or any other characteristics. On the contrary, an appropriate waiver standard would focus simply on whether a particular source is available to consumers of ideas in the relevant geographic market, should they choose to listen, watch, or read that source.

Once the physical capacity of a station, newspaper, or other media competitor to reach the market is established, the only remaining distinction between market participants as sources of diversity or competition is the current effectiveness of their operations -- a factor that is continually in flux. Radio programming, for example, consists of a large variety of combinations of music, news, talk, and entertainment programming. To the extent that any one station is more successful at a given moment in attracting larger or otherwise more attractive audiences than other stations, that is purely a function of the success of its current programming and other operational characteristics -- all of which are freely available to its rivals as well. Format changes (or other programming adjustments) are extremely common in radio, and those adjustments frequently cause audience shifts (and, ultimately, shifts in advertising revenues). The fact that a particular station currently enjoys higher ratings than a rival

station, however, does not make the rival any less "available" to listeners as an alternative source of entertainment or information. The same is true with respect to newspapers, cable and other video suppliers, and the other competitors in the media marketplace.

In short, the availability of a sufficient number of voices in the market, not the identity or strength of the speakers or the messages they currently deliver, is the key to a determination that adequate diversity exists and should be the sole area of inquiry for the Commission in evaluating waiver requests. Where a sufficient number of such voices exist, the Commission can be confident that the public will have access to a diversity of sources of information and opinion.[122] In such circumstances, a prohibition of common ownership of newspaper and broadcast outlets is not warranted.

C. The Presence and Impact on Diversity of the Full Range of Competing Information Providers Should Be Taken Into Account in Calculating the Number of Independent "Voices" in a Market.

As to the question of which voices should be included in determining whether sufficient diversity will remain in a market following a proposed combination,[123]

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[122] Similarly, in view of the extremely high level of diversity among advertising vehicles in most markets, there is no reason to believe that undue concentration of economic power would be an issue on a generalized basis. To the extent the Commission has any residual concern about "market power," NAA submits that the Commission generally should defer to the Department of Justice and the Federal Trade Commission, the expert agencies charged with enforcement of the antitrust laws. See Section V.F., infra.

[123] See Notice of Inquiry, 11 FCC Rcd at 13010-11.

NAA urges the Commission to take into account all broadcast stations -- both commercial and non-commercial -- as well as the numerous and significant non-broadcast media discussed in Section III above.

With regard to broadcast stations, the Commission previously has recognized that non-commercial stations add to marketplace diversity and are properly included in evaluating one-to-a-market waiver requests.[124] NAA submits that the same reasoning applies in the present context as well, and that there is no reason to exclude non-commercial stations from any diversity evaluation.

Moreover, any waiver standard adopted by the Commission should recognize that, as set forth above, newspapers and radio broadcast stations -- indeed, all information providers -- operate in a far different competitive environment than the one they faced 20 years ago. Not only television and radio stations, but cable television, wireless cable, direct broadcast satellites, Internet services, and other information sources are providing the public with access to an unprecedented amount of information -- as well as competing for the consumer and advertising dollar. The Commission recognized in the 1989 one-to-a-market proceeding that marketplace diversity was enhanced by these media, but -- again out of an abundance of caution and because the one-to-a-market rule itself dealt only with traditional broadcast outlets -- opted not to include them in that waiver analysis.[125]

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[124] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[125] See id. at 1753.

NAA submits that the Commission's multiple ownership rules or policies, to the extent they are retained by the Commission as we approach the 21st Century, should be based on a recognition of marketplace realities and that an analysis of diversity therefore should include competing non-broadcast media. This is particularly true with respect to waivers of the newspaper/broadcast cross-ownership rule, which itself applies to more than traditional broadcast outlets. Newspapers are subject to intense and increasing competition from a wide variety of non-broadcast media, as discussed in Section III above. At an absolute minimum, the Commission should take into account (in addition to commercial and non-commercial television and radio stations) daily and weekly newspapers, cable systems, and wireless cable and other video program suppliers addressing local needs.

As set forth above, morever, a wide range of alternative media are present in virtually every market, and provide substantial competition for the more "traditional" information providers. Rather than engaging in an analysis of the number and impact of the specific alternative media outlets in each particular market, NAA submits that the Commission may wish to consider taking these media into account by counting broadcast, newspaper, cable, wireless cable, and other readily quantifiable "voices," but establishing the threshold number of such voices needed to support a waiver at a level substantially lower than the "30 voices" test currently used in the one-to-a-market context. Such a standard would both acknowledge the ubiquitous presence of alternative information providers and, at the same time, simplify the showing required to support a waiver.

D. The Commission Should Define the Market Realistically, Using Accepted Industry Standards With Respect to the Geographic Area in Which a Station or Newspaper Competes.

The Commission notes that the geographic area considered under its existing standard for evaluating newspaper/radio waiver requests is the area of overlap between the defining signal contour of the radio station and the area of significant circulation of the newspaper. The agency asks for comment, however, regarding the proper scope of the geographic market to be used to assess future requests for waiver of the rule.[126] NAA submits that the current method for assessing diversity in the context of the newspaper/radio cross-ownership rule is too limited, and supports adoption of a standard at least as broad as those used to determine the number of such voices in a market in the context of the Commission's other broadcast cross-ownership rules.

For example, as the Commission observes, the relevant market for purposes of the radio contour overlap rules is the area encompassed by the principal community contours of the mutually overlapping stations proposed to be commonly owned.[127] NAA believes that this well-established, yet conservative, standard is an appropriate starting point in evaluating the level of diversity in a market for purposes of newspaper/radio cross-ownership waivers as well. Thus, the Commission certainly should include in the "voices" count all broadcast stations whose principal community contours overlap either the area of significant circulation of the newspaper or the

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[126] See Notice of Inquiry, 11 FCC Rcd at 13011-12.

[127] See id. at 13012-13.

principal community contour of the radio station(s) to be commonly-owned with the newspaper.

As the Commission acknowledged in revising its radio contour overlap rules, however, the principal community contour overlap standard, without more, is "likely to be conservative in counting the number of stations receivable by listeners"[128] and thus likely to understate the true level of diversity in the area. Because it is equally likely that this standard would be under-inclusive as applied in the newspaper/radio context -- particularly where a smaller newspaper is involved -- NAA urges the Commission to adopt a supplemental test for determining the number of voices in the market.

In a number of other contexts, the Commission has concluded that the Nielsen Designated Market Area ("DMA") is the most accurate method for determining the areas served by local television stations.[129] Indeed, apart from the Congressionally-sanctioned use of DMAs in the must-carry rules, the Commission itself has recently confirmed its belief that the DMA, as a general matter, provides a reasonable "proxy" of a television station's geographic market, both for competition and for diversity purposes.[130] Similarly, in the 1989 proceeding in which it adopted the current "Top 25/30 voices" presumptive standard for waiver of the television/radio one-to-a-market rule, the FCC determined that it was appropriate to use the comparable Arbitron Area of Dominant Influence, or "ADI," to define the relevant television market, and the

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[128] Revision of Radio Rules and Policies, 7 FCC Rcd at 2779.

[129] See Television Market Definition, 11 FCC Rcd at 6220.

[130] See Review of Television Broadcasting Regulations, FCC 96-438, ¶¶ 14-15.

smaller included "television metro" portion of the market to define the geographic area in which radio stations compete.[131] Subsequently, in view of Arbitron's withdrawal from the television ratings field, the FCC announced that waiver proponents could submit broadcast "voices" computations based on the Nielsen DMA for television stations and the Nielsen television metro area for radio facilities.[132]

NAA submits that there is no legitimate reason to define the relevant geographic market for purposes of newspaper/radio waiver requests more narrowly than it is defined for purposes of the radio contour overlap and one-to-a-market rules. Accordingly, NAA urges the Commission to include in its "voices" count, in addition to those voices identified through use of the contour overlap method described above, (i) any television station licensed to a community within the same DMA; (ii) any radio station licensed to a community within the television metro portion of the DMA market; and (iii) any daily newspaper published in a community within the DMA. Further, assuming that the Commission determines to include non-broadcast media in the diversity analysis, the NAA urges the Commission to include those non-broadcast media present in these geographic areas as well. Adoption of these combined tests, NAA submits, will enable the Commission to arrive at a realistic assessment of the level of diversity in the economic market in which the newspaper or radio station in question operates.

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[131] 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[132] See Media/Communications Partners Limited Partnership, 10 FCC Rcd 8116, n.3 (1995). See also Review of the Commission's Regulations Governing Television and Broadcasting, 10 FCC Rcd 3524, 3539 n.59 (1995).

E. Applicants Should Not Be Required to Make Any Additional "Special Circumstances" Showing in Support of Waiver Requests.

The Commission also seeks comment on whether it should require a showing of "special circumstances" in situations otherwise meeting whatever "objective criteria" it may adopt.[133] NAA strongly opposes any policy that would require a preliminary finding that "special circumstances" exist, in addition to a "voices" count or similar diversity determination, before a waiver could be granted. There simply is no basis to impose any additional test to support a waiver of the rule,[134] particularly in light of the fact that no such requirement is imposed under the Commission's presumptive waiver policy as currently applied to local television/radio combinations.

Indeed, in adopting its one-to-a-market waiver policy in 1989, the Commission expressly determined that its concerns regarding diversity were so attenuated in the presence of a sufficient number of competing media voices that, given the other public interest factors present, no additional showing was necessary to support a grant of the

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[133] Notice of Inquiry, 11 FCC Rcd at 13013.

[134] The legislative history to the 1994 appropriations order, referred to by the Commission in the Notice of Inquiry should not be regarded as requiring the Commission to adopt any "special circumstances" or "separate affirmative determination" requirement in connection with a relaxed waiver standard. Id. at 13006-08, 13013-14. As the FCC itself notes, the 1995 and 1996 appropriations acts and their accompanying conference reports contain no such language, and the proscription against spending funds to reevaluate policies related to the newspaper/broadcast cross-ownership rule has been eliminated. See id. at 13007-08. Thus, the 1994 legislative history should not be a factor in the Commission's consideration of this matter.

waiver.[135] NAA submits that application of an additional "special circumstances" requirement is equally inappropriate in the newspaper/broadcast context. Further, any requirement of a showing of proposed programming or other "content" benefits to be derived from a proposed transaction could involve the Commission unnecessarily in sensitive areas of editorial discretion that are entitled to substantial deference in view of the First Amendment interests at stake.[136]

F. No Additional Limitation on "Market Power" Is Necessary or Appropriate.

The Commission also asks whether, in evaluating waiver requests, it should "consider from a competition standpoint the size of the newspaper involved" or "establish a test based on the proportion of local advertising dollars that the proposed combination would command."[137] The Commission's concern in this regard appears to be generated largely by a reference to the percentage of local advertising expenditures "captured" by local newspapers as opposed to radio stations.[138]

As discussed briefly in Section III above, however, the 49 percent figure relied upon by the Commission is considerably oversimplified and overstated. For example, that figure includes revenues generated by the sale of classified advertising as well as

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[135] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1743.

[136] NAA does not object, however, to adoption of a waiver standard that allows for a separate "case-by-case" analysis of requests that do not meet the objective criteria for presumptive waiver.

[137] Notice of Inquiry, 11 FCC Rcd at 13014.

[138] Id.

local "retail" advertising.[139] NAA submits that classified advertising sales are irrelevant in the context of newspaper/broadcast competition, since radio and television stations typically have no involvement whatsoever in the classified ad field. The statistics cited by the Commission are further flawed in that they apparently do not include "breakouts" of local advertising revenues for such significant competitors as magazines, farm and business publications, and -- most significantly -- direct mail advertisers.

Moreover, neither the national nor the local advertising marketplace is the monolithic arena the Commission appears to assume. For example, newspapers depend heavily on classified advertising revenues, an area in which broadcasters are not involved. On the other hand, radio stations often target advertisers who seek to reach particular demographic groups or specialized audiences, whereas daily newspapers typically attract advertisers seeking to reach a broader, "mainstream" audience. Radio advertising also tends to be less expensive than television commercial time, and therefore is likely to attract a different customer base. In other words, advertisers utilize different media for different purposes, and analysis of competition among those media is not susceptible of any simple formulistic approach.

In any event, there is no suggestion on the record to date that newspaper/ broadcast cross-ownership poses a threat of undue concentration either in the advertising market as an undifferentiated whole or in any particular sector of that

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[139] See NAA Facts About Newspapers at 10; Robert J. Coen, '96 Expected to Deliver Energetic Ad Growth, Advertising Age, May 20, 1996, at 22 (Chart by McCann-Erickson Worldwide, US Advertising Volume).

market. As demonstrated in Section III, broadcasters and newspaper publishers compete today in a highly diverse marketplace in which many of the vast array of alternative information providers also serve as alternative vehicles for advertising. Just as the very availability of an alternate media "voice" serves to ensure diversity, the availability of a wide array of alternative outlets for advertising serves to offset any concern as to the current "market power" of any particular outlet. For example, cable advertising revenues, including local ad revenues, are growing rapidly, as are advertising revenues for magazines, direct mail services, and weekly and other specialized newspapers.[140]

The presence of those alternative outlets for advertising provides ample protection against any prospect of "market dominance" by newspapers or broadcast stations. Given the number of competing broadcast outlets in most markets and the rapidly expanding array of alternative media and advertising outlets, there is no reason to believe that ownership of broadcast stations by newspaper publishers, to the same extent such stations may be owned by any other party, is likely to have an appreciable impact on economic competition.

Accordingly, NAA submits, the FCC should not concern itself with any arbitrary "cap" on market power. To the extent any issue in this regard may arise in the context of a particular transaction, of course, it can be addressed by the Department of Justice or the Federal Trade Commission, the agencies charged with responsibility for administration of the antitrust laws and best equipped to undertake the appropriate

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[140]See NAA Facts About Newspapers at 10.

market analysis. Duplicative analyses of "market power," on the other hand, are both costly and time-consuming and add an unnecessary step to Commission consideration of a particular transaction.

G. An Appropriate Presumptive Waiver Standard Would Include Relief for Failing Stations and Newspapers, and Permit the Continued Common Ownership of Grandfathered Facilities.

Finally, the Commission seeks comment on whether there are other "objective criteria" besides the number of independent voices or market size that warrant a waiver, "such as saving a failing station or newspaper, [or] reacquisition of a media property by a former owner."[141] Although NAA opposes the imposition of any "special circumstances" test over and above an objective "voices" test, NAA agrees that there are situations in which a waiver may be warranted even though the minimum voices test is not met.

First, as the Commission recognized in the New York Post decision, it is hard to imagine a situation in which the public interest would be served by allowing a newspaper to fail or a broadcast station to go silent. Accordingly, NAA supports granting waivers to preserve failing stations or newspapers. Similarly, as the Commission also has found, there is no appreciable impact on diversity in allowing a former owner to reacquire a previously-owned facility.[142] Again, NAA submits, such a return to the status quo ante would not be contrary to the public interest. In addition,

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[141] Notice of Inquiry, 11 FCC Rcd at 13013.

[142] See Field Communications Corp., 65 FCC2d 959 (1977).

NAA submits that allowing the sale of grandfathered combinations to a single buyer -- which similarly does not alter the existing level of diversity in the market -- is in no way contrary to the public interest and should be allowed. Finally, the Commission should allow for consideration of other public interest factors under a "case-by-case" approach in circumstances that do not qualify for a presumptive waiver.

VI. CONCLUSION

For the reasons set forth above, NAA submits that the Commission should give broadcasters and newspaper publishers the freedom to compete effectively with cable and other multichannel providers, as well as with the host of new print and electronic sources of news, information and entertainment. Relief from the outdated cross-ownership restriction not only will help preserve broadcast stations and newspapers as viable voices, but will spur their evolution into more diversified and innovative competitors in today's technologically advanced multimedia marketplace.

Accordingly, NAA submits, the Commission should promptly initiate rulemaking proceedings to repeal the newspaper/broadcast cross-ownership prohibition now set forth in Section 73.3555(d) of the Rules. In the interim, in this proceeding, the FCC should announce a strong presumptive waiver policy for newspaper/radio cross-ownership, based upon the existence of a specified number of competing media voices in the market and taking into account the enormous growth in the number and variety of competing information providers in the two decades since the cross-ownership ban was adopted. Adoption of such a waiver policy will serve as a crucial

initial step toward the long overdue elimination of this anachronistic and unnecessary restriction.

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